Bukit Waha Quarry Sdn Bhd v Teguh Permata Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-18 OF 1998(I)
ABDUL MALIK ISHAK J
28 JANUARY 2000

Civil Procedure *— Pleadings — Amendment of — Amendment made without leave — Application to set aside amended pleadings — Whether defendant prejudiced thereby — Whether amendment should be allowed — Rules of the High Court 1980 O 20 r 1*

The plaintiff filed a writ of summons on 20 April 1998. On 27 July 1998, the plaintiff amended the writ and statement of claim without leave of court pursuant to O 20 r 1 Rules of the High Court 1980 ('the RHC'). On 11 September 1998, the amended pleadings were served on the defendant. The defendant applied on 24 September 1998 to disallow the amendment. The defendant argued that the deletion of certain paragraphs from the claim denied the defendant the right to raise a triable issue during the application for summary judgment. The senior assistant registrar dismissed the defendant's application. The defendant appealed.

Held, dismissing the application and allowing the amendment of the statement of claim with costs to the defendant:

(1) A court will always be magnanimous in granting an amendment of pleadings so long as it will not cause injustice to the other side. To cushion any injustice, an order of costs should be awarded to the other side (see p 400D).

(2) In deciding whether to disallow the amendments, the court would use the same approach as it would if an application was before it for leave to make the same amendments.

(3) It was of paramount importance that the true and correct facts be presented for proper adjudication of the issues. To disallow an amendment simply because it would defeat the defendant's right to raise a triable issue would amount to saying one cannot afford to make a mistake in drafting pleadings. This would go against the spirit and intendment of O 20 r 1 of the RHC (see p 402D–402G).

(4) Any excess claimed by the plaintiff may be defeated by the defendant raising a counterclaim or set-off (see p 403B–F).

(5) The character of the suit remained one of a claim by the plaintiff against the defendant for debts due and owing. There had been no change (see p 404D–E).

[Bahasa Malaysia summary

Plaintif telah memfailkan satu writ saman pada 20 April 1998. Pada 27 Juali 1998, palintif telah meminda writ dan pernyataan tuntutan

A tanpa kebenaran mahkamah menurut A 20 k 1 Kaedah-Kaedah Mahkamah Tinggi ('KMT'). Pada 11 September 1998, pli yang dipinda tersebut telah disampaikan ke atas defendan. Defendan telah memohon pada 24 September 1998 untuk tidak membenarkan pindaan tersebut. Defendan menghujahkan bahawa pemotongan perenggan-perenggan tertentu daripada tuntutan tersebut menafikan
B defendan hak untuk menimbulkan satu persoalan yang boleh dibicarakan semasa permohonan penghakiman terus. Penolong kanan pendaftar telah menolak permohonan defendan. Defendan telah membuat rayuan.

C **Diputuskan**, menolak permohonan tersebut dan membenarkan pindaaan pernyataan tuntutan dengan kos kepada defendan:

(1) Sebuah mahkamah akan sentiasa berbesar hati dalam membenarkan satu pindaan pli selagi ia tidak menyebabkan ketidakadilan kepada pihak yang satu lagi. Untuk mengurangkan apa-apa kesan ketidakadilan, satu perintah untuk kos hendaklah
D diawardkan kepada pihak yang satu lagi (lihat ms 400D).

(2) Dalam memutuskan sama ada untuk tidak membenarkan pindaan-pindaan, mahkamah akan menggunakan pendekatan yang sama sebagaimana ia akan jika satu permohonan dihadapkan untuk kebenaran membuat pindaan yang sama.

E (3) Adalah menjadi keutamaan agar fakta-fakta yang benar dan betul dikemukakan untuk pengadilan yang betul tentang persoalan-persoalan tersebut. Untuk tidak membenarkan satu pindaan hanya kerana ia akan mengalahkan hak defendan untuk menimbulkan satu persoalan yang boleh dibicarakan adalah
F seperti mengatakan seseorang tidak mampu untuk membuat kesilapan dalam mendrafkan pli. Ini akan (lihat ms 402D–402G).

(4) Apa-apa melampau yang dituntut oleh plaintif mungkin akan dikalahkan oleh defendan yang menimbulkan satu tuntutan balas atau penepian (lihat ms 403B–F).

G (5) Sifat guaman kekal sebagai satu tuntutan oleh plaintif terhadap defendan untuk hutang yang perlu dibayar dan terhutang. Tiada perubahan berlaku (lihat ms 404D–E).]

Notes

For cases on amendment of pleadings, see 2(2) *Mallal's Digest* (4th
H Ed, 1998 Reissue) paras 3425–3444.

Cases referred to

Abdul Johari bin Abdul Rahman v Lim How Chong & Ors [1997] 1 MLJ 629 (refd)

I *Amon v Bobbett* 22 QBD 548 (refd)

Boss s/o Ramasamy v Penang Port Sdn Bhd & Anor [1996] 5 MLJ 511 (refd)

Bow Maclachlan & Co v The Camosun [1909] AC 597 (refd)
British Anzani (Felixstone) v International Marine Management (UK) [1979] 2 All ER 1063 (refd)
Brown Shipley & Co v Alicia Hosiery (1966) 1 Lloyd's Rep 668 (refd)
Chin Kok Kwong Construction Sdn Bhd v Sunrise Towers Sdn Bhd [1986] 2 MLJ 41 (refd)
City and Westminster Properties (1934) Ltd v Mudd [1959] Ch 129; [1958] 3 WLR 312; [1958] 2 All ER 733 (refd)
Grant Advertising International Inc & Anor v Glaze [1968] 1 MLJ 31 (refd)
GL Baker Ltd v Medway Building & Supplies Ltd [1958] 1 WLR 1216 (refd)
Hanak v Green [1958] 2 All ER 241; [1958] 2 QB 9 (refd)
Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor [1988] 3 MLJ 348 (refd)
John Trawe Kuda v Adtec Sdn Bhd [1996] 5 MLJ 335 (refd)
Ketteman & Ors v Hansel Properties Ltd & Ors [1987] AC 189 (refd)
Khong Kim Ching v Hassan bin Din & Ors [1973] 2 MLJ 173 (refd)
Lim Yong Swan v Lim Jee Tee & Anor [1993] 1 SLR 500 (refd)
Looi Guan Kway v Low Lean Bok & Ors [1938] MLJ 35 (refd)
Lord Hammer v Flight (1876) 24 WR (refd)
Mahan Singh v Government of Malaysia [1973] 2 MLJ 149 (refd)
Nadreph Ltd v Willmet & Co [1978] 1 All ER 746 (refd)
Nelson v Nelson [1958] 1 WLR 894; [1958] 2 All ER 744 (refd)
Ng Chai Yang v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1994] 2 MLJ 336 (refd)
Palaniappan v Universiti Pertanian Malaysia [1995] 1 MLJ 353 (refd)
Pet Far Eastern (M) Sdn Bhd v Tay Young Huat (also known as Eugene Tay Yong Huat) & Ors [1999] 2 AMR 2553 (refd)
Philipps v Philipps (1878) 4 QBD 133 (refd)
Re SNVSM Letchumanan Chetty, ex p RMKRV Firm [1936] MLJ Rep 224 (refd)
Saga of Bond Street Ltd v Avalon Promotions Ltd [1972] 2 QB 325 (refd)
Shanghai Hall Ltd v Town House Hotel Ltd [1967] 1 MLJ 223 (refd)
Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor [1975] 2 MLJ 188 (refd)
The Casper Trader (1991) 2 Lloyd's Rep 237 (refd)
Williams v Agius [1914] AC 522 (refd)
Yong Joo Chuan v Tan Teck Chiang [1978] 1 MLJ 173 (refd)

Legislation referred to

Rules of the High Court 1980 O 1 r 20, O 18 r 17, O 20 rr 1, 1(1), 4, 4(2), 5

Tay Hong Huat (*Tay & Helen Wong*) for the plaintiff.
Wu Tern Yue (*Wu & Co*) for the defendant.

Abdul Malik Ishak J:

Background facts

A brief chronology of events must be set out in order to understand the case better and these events can conveniently be itemized as follows:

(1) 20 April 1998 — The writ of summons and the statement of claim were filed by the Plaintiff and thereafter served on the defendant.

(2) 27 June 1998 — The defendant entered an appearance.

(3) 14 July 1998 — The defendant filed and served the statement of defence and counterclaim dated 13 July 1998.

(4) 30 July 1998 — The plaintiff filed and served the reply and defence to counterclaim dated 27 July 1998.

(5) 27 July 1998 — The plaintiff amended the writ of summons and the statement of claim without the leave of the court pursuant to O 20 r 1 of the Rules of the High Court 1980 ('the RHC') and not O 1 r 20 of the RHC as stated in encl 9.

(6) 11 September 1998 — The amended writ of summons and the amended statement of claim were served on the defendant.

(7) 24 September 1998 — The defendant applied pursuant to O 20 r 4 of the RHC to disallow the amendment.

(8) 11 March 1999 — The defendant's application was dismissed by the senior assistant registrar ('SAR') with each party to bear its own costs.

(9) 13 March 1999 — The defendant filed an appeal to the judge in chambers against the decision of the SAR as seen in encl 30.

Amendment of the writ without leave of the court

Order 20 r 1(1) of the RHC states as follows:

> Subject to paragraph (3), the Plaintiff may, without the leave of the Court, amend the writ once at any time before the pleadings to the action begun by the writ are deemed to be closed.

and this was done by the plaintiff and the plaintiff made the following amendments by deleting items 31, 48, 49, 56, 60, 68, 74, 81 and 86 of the annexure to the statement of claim. The details of these deleted items may be stated as follows:

31	Bayaran royalti kepada koperasi	13 Mei 1994	RM7,426
48	Bayaran 'Trip Tax' (April 94 – Jun 94)	31 Ogos 1996	RM1,872
49	Bayaran 'Trip Tax' (Julai 94 – Ogos 94)	31 Ogos 1996	RM2,476
56	Bayaran kepada Teguh Permata	15 November 1994	RM1,132
60	Bayaran kepada Teguh Permata	5 Disember 1994	RM1,440

68	Bayaran kepada Teguh Permata	23 Januari 1995	RM1,223
74	Bayaran kepada Teguh Permata	17 Mac 1995	RM635
81	Bayaran kepada Teguh Permata	28 April 1995	RM1,215
86	Bayaran kepada Teguh Permata	19 Jun 1995	RM779

The statement of claim was also amended by deleting the total amount of RM477,553.33 to read RM459,355.33. It must be emphasized that minor amendments were also made to items 1, 2, 3, 4, 10,39, 40, 64 and 65 of the annexure to the statement of claim. These amendments were, however, inconsequential in nature.

The defendant's application to disallow the amendments made without leave under O 20 r 4 of the RHC was dismissed by the SAR. Aggrieved by the decision of the SAR, the defendant filed the present appeal as seen in encl 30 and not encl 32 as suggested.

General principles of law together with the arguments advanced by the parties

It is now trite law that the court will always be magnanimous in granting an amendment to pleadings so long as it will not cause an injustice to the other side (*Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348) and I may add that to cushion the injustice that may be caused to the other side, costs should be awarded as a matter of course. Aitken J enunciated three basic principles to apply in considering an application by the plaintiff to amend the plaint in the case of *Looi Guan Kway v Low Lean Bok & Ors* [1938] MLJ 35, and these three basic principles may be stated as follows:

(1) there is a bona fide on the part of the applicant — in this case the plaintiff;

(2) the amendments will not prejudice the other side and readily be compensated by costs;

(3) the proposed amendments must not turn a suit of one character into a suit of another and inconsistent character.

A list of authorities can easily be drawn up on the subject matter of amendments and legal practitioners are advised to read them: *Grant Advertising International Inc & Anor v Glaze* [1968] 1 MLJ 31; *Chin Kok Kwong Construction Sdn Bhd v Sunrise Towers Sdn Bhd* [1986] 2 MLJ 41; *Khong Kim Ching v Hassan bin Din & Ors* [1973] 2 MLJ 173; *Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor* [1975] 2 MLJ 188; *Yong Joo Chuan v Tan Teck Chiang* [1978] 1 MLJ 173; *Mahan Singh v Government of Malaysia* [1973] 2 MLJ 149; *Palaniappan v Universiti Pertanian Malaysia* [1995] 1 MLJ 353; *Boss s/o Ramasamy v Penang Port Sdn Bhd & Anor* [1996] 5 MLJ 511; *John Trawe Kuda v Adtec Sdn Bhd* [1996] 5 MLJ 335; and *Abdul Johari bin Abdul Rahman v Lim How Chong & Ors* [1997] 1 MLJ 629.

In considering the validity of the amendments, the requirement under O 20 r 4(2) of the RHC empowers this court to see what would this court

do if an application for leave to make those amendments had been made under O 20 r 5 of the RHC. In short, it is necessary for me to consider in extenso the scope and ambit of O 20 r 5 of the RHC.

Order 20 r 4(2) of the RHC reads as follows:

> Where the court hearing an application under this rule is satisfied that if an application for leave to make the amendment in question had been made under rule 5 at the date when the amendment was made under r (1) or r3(1) leave to make the amendment or part of the amendment would have been refused, it shall order the amendment or that part to be struck out.

It is germane to mention that O 20 r 5 of the RHC finds a corresponding similarity with the English rule and the Singapore rule and references to salient authorities from these two countries will do no harm at all. Order 20 r 5 of the RHC states as follows:

> (1) Subject to O 15 rr 6, 7 and 8 and the following provisions of this rule, the court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
>
> (2) Where an application to the court for leave to make the amendment mentioned in paras (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstances mentioned in that para if it thinks it just to do so.
>
> (3) An amendment to correct the name of a party may be allowed under para (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.
>
> (4) An amendment to alter the capacity in which a party sues (whether as Plaintiff or as defendant by counterclaim) may be allowed under para (2) if the capacity in which, if the amendment is made, the party will sue is one which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.
>
> (5) An amendment may be allowed under para (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

In *GL Baker Ltd v Medway Building & Supplies Ltd* [1958] 1 WLR 1216 at p 1231, Jenkins LJ succinctly said that all amendments ought to be granted 'for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings'.

In the case of *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129; [1958] 3 WLR 312; [1958] 2 All ER 733, an amendment was readily allowed by the judge in regard to the defendant's pleadings which

enabled the defendant to successfully rely on the principle of *Re William Porter & Co Ltd* [1937] 2 All ER 361. A

In *Nelson v Nelson* [1958] 1 WLR 894; [1958] 2 All ER 744, the Court of Appeal allowed an amendment to a petition by adding a charge of cruelty to a petition for divorce grounded principally on desertion.

Webster J in *The Casper Trader* (1991) 2 Lloyd's Rep 237 was of the B view that it was a case of balancing the applicant's need to amend and the opposing party's prejudice that will be exercised by the court before granting the application to amend. Yong Pung How CJ (Singapore) in *Lim Yong Swan v Lim Jee Tee & Anor* [1993] 1 SLR 500 agreed with the view of Webster J in *The Casper Trader*. What was the true nature and scope of the amendments which the Plaintiff sought? It was argued that the amendments C that were made by deleting items 31, 48, 49, 56, 60, 68, 74, 81 and 86 of the annexure to the statement of claim had denied the defendant the right to raise triable issues during the hearing of the plaintiffs application for summary judgment. It was also argued that the amendment made to the total amount of RM477,553.33 to be read as RM459,355.33 would greatly D prejudice the defendant. I must at once say that amendments should be made when they are necessary to be made so that the issues of controversy between the parties would be placed before the court for adjudication. It is of paramount importance that the true and correct facts are presented to the court for proper adjudication of the dispute between the parties. To say that the defendant would be unable to raise triable issues to ward off the E plaintiffs application for summary judgment would be tantamount to saying that an amendment, however crucial, should be refused by the court. This cannot be the law and I will not accept it as such. It would not be fair and proper to simply disallow an amendment on the sole ground that such an amendment would defeat the defendant's rights to raise triable issues because an amendment of this nature would simply put all the relevant facts F in its correct perspective for the court to weigh in a balance and adjudicate accordingly. To accede and agree to the contention of the defendant would simply mean that no party can afford to make any mistake at all in drafting the pleading and any amendment which has the effect of depriving the defendant's right to defend the action must not be allowed. This is not a G correct exposition of the law as it goes against the spirit and intendment of O 20 r 1(1) of the RHC. Lord Brandon in *Ketteman & Ors v Hansel Properties Ltd & Ors* [1987] AC 189, at p 212 of the report had this to say:

> With regard to the principles on which his discretion to allow or refuse the applications to amend should be exercised, the judge referred to the notes to RSC O 20 r 5, in the Supreme Court Practice 1982 and to the authorities H there cited. The effect of these authorities can, I think, be summarized in the following four propositions. First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided. Secondly, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for I mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter

> of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs.

This was not a case of a late amendment. The amendments were made with expeditious despatch: three months seven days after the writ of summons and the statement of claim were filed by the plaintiff and thereafter served on the defendant.

In regard to the amendment of the quantum to RM459,355.33 which the defendant was most unhappy with and if indeed the correct figure was RM477,553.33, there was nothing to stop the defendant from advancing a claim by way of counterclaiming that amount against the plaintiff. In my judgment, the defendant should not be permitted to be unjustly enriched purely by the mistake of the plaintiff in pleading that figure in the original statement of claim. The value of a counterclaim can never be underestimated. It is substantially a cross-action and not merely a defence to the plaintiff's claim. It is in the nature of a separate action (*Bow Maclachlan & Co v The Camosun* [1909] AC 597; and *Williams v Agius* [1914] AC 522). Bower LJ in *Amon v Bobbett* 22 QBD 548 remarked that:

> A counterclaim is to be treated for all purposes for which justice requires it to be so treated as an independent action.

and clearly, therefore, the defendant in the present appeal was not without a remedy. As demonstrated, the defendant could still proceed by way of a counterclaim against the plaintiff for the difference in the amount subject, of course, to the available evidence. Alternatively, the defendant could also rely on the defence of set-off. Order 18 r 17 of the RHC sets out the defence of set-off and it is worded as follows:

> Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence and set-off against the plaintiff's claim, whether or not it is also added as a counterclaim.

When the defence of set-off is relied upon by the defendant, the court has no choice but to weigh that defence in a balance according to the available evidence. The power of the High Court to adjudicate on the defence of set-off can never be doubted and that power has been transformed into legislative form as reflected in item 13 to the Schedule of the Courts of Judicature Act 1964. A set-off is a plea where the defendant openly acknowledges the justice of the plaintiff's case but sets up another case of his own to counterbalance the claim of the plaintiff, either in whole or in part. And as to whether the matter pleaded constitutes a set-off or otherwise is purely a matter of law and not one of pleading (*Hanak v Green* [1958] 2 All ER 241; [1958] 2 QB 9 at p 26). A valid defence of set-off must revolve around a claim in money and the rule provides that the sum need not have to be ascertained (*Shanghai Hall Ltd v Town House Hotel Ltd* [1967] 1 MLJ 223). Set-off was considered in many cases and covering many areas; a few examples should be of some interest:

(1) *Brown Shipley & Co v Alicia Hosiery* (1966) 1 Lloyd's Rep 668; and *Saga of Bond Street Ltd v Avalon Promotions Ltd* [1972] 2 QB 325, where the courts there considered set-off in the context of the bills of exchange;

(2) *Nadreph Ltd v Willmet & Co* [1978] 1 All ER 746, where the court there had occasion to consider the issue of set-off in the context of the benefit that accrued to the plaintiff arising from the defendant's wrong.

(3) *British Anzani (Felixstone) v International Marine Management (UK)* [1979] 2 All ER 1063, where set-off arose out of a dispute pertaining to rent.

(4) *Re SNVSM Letchumanan Chetty, ex p RMKRV Firm* [1936] MLJ Rep 224, where the court applied set-off to a bankruptcy case.

Next, an argument was advanced on behalf of the defendant to the effect that the amendments to items 1, 2, 3, 4, 39, 40, 64 and 65 of the annexure to the statement of claim would convert the suit of one character into another and inconsistent character. With respect, I beg to disagree. The suit remains a suit by the plaintiff against the defendant for debts due and owing from the defendant whereby the plaintiff has made several payments on behalf of the defendant and also advances to the defendant itself as stated in para 3 of the statement of claim. As can be seen, amendments were made to the annexure and these were the particulars of items that would be added later in the course of the trial. To me, having perused the amendments of the annexure to the statement of claim, the character of the suit remained the same. It was pure and simple, a claim of debt due and owing by the defendant to the plaintiff.

The differences in items one and two of the annexure to the statement of claim between 'recovery of monies lent to (kepada) AM Tan/KS Lie' (as per the original pleading) and 'recovery of monies lent via (through) (melalui) AM Tan/KS Lie' (as per the amendments) were basically confined to the evidence to be adduced to support the fact that the defendant owed the plaintiff monies as particularized. The same arguments ring true and must be vigorously applied to items 3, 4, 39, 40, 64 and 65 of the annexure to the statement of claim. The amendments to these items can safely be said to be for clarification purposes so as not to catch the defendant by surprise and to enable the disputes between the parties to be litigated in an orderly fashion. Brett J in *Lord Hammer v Flight* (1876) 24 WR at p 347 aptly said:

> Pleadings now are to be merely concise statements of facts which the party pleading deems material to his case.

Each party must necessarily plead all the material facts on which he proposes to rely at the trial, otherwise he is not entitled to give any evidence of them at the trial. An important averment must be incorporated as it would be essential to success. Brett LJ in *Philipps v Philipps* (1878) 4 QBD 133 succinctly said:

> If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial any fact which is not stated in the pleadings.

Indeed, it must be to circumvent these pitfalls that the amendments were filed by the plaintiff.

Abdul Malek Ahmad JCA (now FCJ) in *Abdul Johari bin Abdul Rahman v Lim How Chong & Ors* in a well-considered judgment, superbly written summed up the law in these words (at p 640 of the report):

> The authorities strongly indicate that the courts should lean towards granting applications for amendments even when a new cause of action or line of defence is raised, provided it is based on the same facts or arose out of the same transaction subject, however, to an award of costs to the other party for the injustice caused by the amendments.

and applying these sage words, I hold and it was my judgment that what the SAR did was correct when he dismissed the defendant's application to disallow the amendments that made by the plaintiff without leave. This meant that the appeal by the defendant in encl 30 must be dismissed and each party to bear its own costs.

In my judgment, the amendments by the plaintiff to the statement of claim should be allowed and costs should be awarded to the defendant for the injustice, if any, that may be caused by the amendments.

But that was not the end of the matter. It was argued that the affidavit in encl 19 and not encl 18 as suggested was defective. Enclosure 19 was an affidavit affirmed by Lie Khin Sin on 26 October 1998 and filed on 31 October 1998. But the name of Lie Khin Sin was also spelt as Lie Khin Shin as seen at the beginning of the affidavit. Because of this difference in spelling it was argued that this created a doubt as to the actual identity of the deponent in encl 19 and, consequently, the plaintiff ought not to be allowed to refer to encl 19. A perusal of the court file showed the following state of affairs: in encl 23 the name 'Lie Khin Shin' which was obviously erroneous was distinctly deleted at p 1 thereof and replaced with the correct spelling of 'Lie Khin Sin' and it was initialled by the commissioner for oaths. In other words; both these two names referred to one and the same person, namely Lie Khin Sin. At any rate, in both encl 19 and 23 the same passport number of the deponent was stated and this impelled this court to invoke O 2 r 1(1) of the RHC to cure such an irregularity. In *Ng Chai Yang v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1994] 2 MLJ 336, I had occasion to say, at pp 341–342 of the report, the following which should be vigorously applied in favour of the plaintiff in the present appeal:

> It is basic and fundamental that in the course of litigation, rules of procedure must be observed. But the courts have from time to time been aware of the danger that too rigid an adherence to the rules in certain circumstances may inappropriately and unjustly deprive a party of his rights. For instance, O 2 r 1 of the RHC says that non-compliance with a rule of procedure at whatever stage of the proceedings 'whether in respect of time, place, manner, form or content or in any other respect' is to be treated as an irregularity. It does not automatically 'nullify the proceedings, any step taken in those proceedings, or

any document, judgment or order therein'. But the court is nevertheless empowered to set aside 'wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein' or to allow an amendment or 'to make such order ... generally as it thinks fit'. Incidentally, the court may also make an ancillary order as to costs or other terms as may be just. In short, O 2 r 1 of the RHC strictly concerns the discretion exercisable by the court when it is faced with non-compliance.

I am of the considered view that no irregularity or defect, whatever its nature, automatically renders the proceeding a nullity. The court is still empowered to consider each case on its merits and make whatever decision it deems just. I am fortified in my view by a passage appearing in the judgment of Cumming-Bruce LJ in *Metroinvest Ansalt v Commercial Union Assurance Co Ltd* [1985] 1 WLR 513; [1985] 2 All ER 318, to the following effect (at p 521F–G):

> 'I would say that in most cases the way in which the court exercises its powers under O 2 r 1(2) is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. But I would construe O 2 r 1(2) as being so framed as to give the court the widest possible power in order to do justice.'

and the very same case was also reported in the AMR vide [1994] 2 AMR 23. It was to do justice that I must cure encl 19 of its irregularity and accept it as it were in order to enable the plaintiff to rely on it. There was no prejudice suffered by the defendant as a direct consequence of that irregularity and this was my judgment and I so hold accordingly.

Next, it was argued that the wrong procedure was adopted by the plaintiff in amending the statement of claim. The endorsement at the top right-hand corner of encl 9 should be O 20 r 1 and not r 20, O 1. The mistake was admitted by the plaintiff and even the SAR overlooked this mistake. I accordingly invoked O 2 r 1(1) of the RHC to cure this obvious irregularity. There was no prejudice suffered by the defendant at all as a result of this minor irregularity and I so hold accordingly.

This appeal revolved entirely around the amendments of the statement of claim by the plaintiff. Lord Griffiths in *Ketteman & Ors v Hansel Properties Ltd & Ors* said at p 220 of the report:

> Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes and the legitimate expectation that the trial will determine the issues one way or the other.

and I hasten to add that each case depends on its own facts and the courts must adopt a robust approach and be magnanimous in allowing amendments so as to do justice to all the litigants. In *Pet Far Eastern (M)*

Sdn Bhd v Tay Young Huat (also known as Eugene Tay Yong Huat) & Ors [1999] 2 AMR 2553 at p 2569, I did say as follows:

> The paramount function and duty of the courts would be to see that justice is done in all cases to all parties. As Lord Denning MR once said in *Doyle v Olby Ltd* (1969) 2 QB 159, at p 166:
>
> > 'We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side.'

and the same case has since been reported in two other popular local law journals, namely:

(1) [1999] 2 CLJ 886; and

(2) [1999] 5 MLJ 558.

For the reasons adumbrated above, I dismissed encl 30 and ordered each party to bear its own costs. The amendments to the statement of claim were allowed and costs should be awarded to the defendant for the injustice that may be occasioned by the amendments thereto.

Order accordingly.

Reported by Andrew Christopher Simon